

Can land policies be reformed without transforming land institutions?

The cases of Madagascar and Benin

André Teyssier, World Bank, AFTAR

Harris Selod, World Bank, DECAR

Context

Several low-income sub-Saharan African countries have undertaken land policy reforms that are designed and implemented as alternatives to former land registration systems established under the colonial period. Those land registration systems had become irrelevant as they were initially meant to strengthen the State authority over land and to grant exclusive property rights to only a small number of individuals.

Facing a system unable to answer to the more recent demand to recognize the diversity of land rights, these reforms have focused on establishing legal and operational frameworks for the formalization of land rights using simple and more affordable methods than traditional land titling. These initiatives were widely supported or even initiated by the international donor community.

However, experience shows that these new land policies not only face conceptual or practical issues of implementation, but may also face opposition, including from the land administration services that are supposed to implement them or from other institutional actors who disagree with the new policy approach. Because they introduce local stakeholders in the new land management system, the reforms are likely to call into question the social standing of land sector officers and to reduce the rents that accrue to them in a complicated and centralized land management system. It is therefore not surprising that these agents develop strategies in response to these reforms and seek to reverse policy directions and approaches, jeopardizing the progress made.

This communication will rely on the cases of Benin and Madagascar to argue that land reforms can be developed only if the reform is based on policy option that are clearly validated and adhered to and extends to the institutions in charge of land administration and management. It will also share some thoughts regarding the design of updated institutional arrangement that are consistent with more incremental land policies.

Benin and Madagascar: two examples of alternative rural land formalization policies facing resistance to change

Both Benin and Madagascar have innovated in choosing to implement decentralized land policies that depart from traditional titling. Both countries have experienced a series of obstacles in the implementation of the policy. We present and derive lessons from these difficulties.

The dynamics of land policies in Benin and Madagascar

Benin: Rural Land Use Plans and Land Use Certificates

- *The history of the Beninese land reform*

In Benin, the legal framework and the policy governing land have undergone major changes since 2007 with the promulgation of a Rural Land Law (2007), a White Paper on Land Policy (2009), Guidelines for the Land Reform (2009), a Land and Domain Policy Declaration (2011) and a Land Code (*Code Domanial et Foncier*)¹ currently submitted to the vote of deputies at the National Assembly. There have been changes in the orientation taken by the land reform resulting from the interplay of a multiplicity of institutional and professional actors involved in the land sector with diverging views and interests in the land reform. The process is still ongoing as it remains to be seen whether the proposed modifications in the legal framework reach sufficient political consensus to ensure stability over time and because the implementation of major institutional changes are still to come with the proposal to create a national land agency (*Agence Nationale du Domaine et du Foncier*) and the ensuing redefinition of the prerogatives of other actors in the land sector.

Although the legal framework governing land only began to be modified in 2007, the genesis of the land reform has been very long and was initiated after the democratic transition in 1991 and the end of socialist rule that allowed for the recognition of private property. The process started in 1993 with the implementation of a program for the management of land and other natural resources initiated by the World Bank, AfD and GIZ and which embedded a mapping of local land rights taking its inspiration from a new approach that had recently been experimented in Ivory Coast. The Plans Fonciers Ruraux (PFR) or *Land Use Plans* consist in documenting land claims by consensually mapping all agricultural uses within a village, surveying the corresponding plots, and delivering land use certificates to rights holders. It is an attempt to clarify the rights of users in a context where the absence of written documentation regarding land uses results in exacerbated conflict (over inheritance, as well as disputes among villages, farmers and pastoralists) and where tenure insecurity limits access to land and deters investment in agricultural production.

Although the pilots were well under way and the land law under preparation, in 2006, the signing of a Compact between the government of Benin and the Millenium Challenge Corporation provided a new impetus to the reform (\$35 million were budgeted for the “access to land” component of the agreement that totalled \$300 million). In addition to the 41 pilots started in 1993, another 66 PFRs were started in the North of Benin under the aegis of the Ministry of Agriculture, while the Millenium Challenge Account

¹ These legal and policy documents are known as: *Loi 2007-03 portant Régime Foncier Rural*; *Livre Blanc de Politique Foncière du Bénin*; *Lettre de Cadrage de la Réform Foncière*, *Déclaration de Politique Foncière et Domaniale*, and draft *Code Foncier et Domanial*.

(MCA Benin) embarked into a larger program of 300 PFRs throughout the rest of the country. In parallel, MCA and the Ministry of Urbanism engaged into efforts to make progress towards a unified legislation on land to complement the 2007 rural land law.

- *A shift in approach ?*

Surprisingly, the implementation of PFRs started even before the necessary changes to the legal framework were made and even before a land policy was formulated. It is only in 2007 that a land law was voted. Although it was restricted to rural land, it revolutionized the approach of land rights formalization in Benin (Lavigne Delville 2010).

The new land law put an end to the State eminent power inherited from colonial times (*principe de domanialité*) on all non-titled or on land that was considered non-privately appropriated land (as non-titled land was systematically assumed to be vacant, to be in the domain of the State, and to be titled in the future).² It also shifted the status of customary land from extra-legal use within the domain of the State to that of private land (Lavigne Delville 2010). To do so, it created a new legal status, the land certificate, which confirms a presumption of right (*présomption de droit acquis*) which exhibits the same characteristics as a title under *immatriculation*, except that it does not provide the guarantee of the State.³ Although the CFR could be viewed as a transitory status with the option to transform it into a title at a later stage, in the minds of those who initiated the law, it was to become the main legal tenure status for rural lands (under customary small-holder cultivation). The adoption of the land use certificate was motivated by the belief that it would appropriately deal with the complexity of local rights in rural areas (embedding the recognition of land rights within the customary practices themselves).

The approach was also novel in that it departed from the centralized process of *immatriculation* (which is unaffordable to most rural households because of high surveying costs and compulsory travel to Cotonou), and because it promoted decentralization of the land administration through village and communal structures (SVGF, COGEF).

- *Results*

The implementation of Rural Land Use Plans underwent long delays necessary to change the legal framework (One may ask whether it was wise to start implementation before these changes were in place? But on the other hand would the changes have occurred without demonstrating the feasibility of the tool on the ground?). Even after the 2007 land law was voted, it took two additional years for the decrees governing the delivery of the land use certificates to be published. The program itself was also delayed by technical disagreements over surveying options between the implementer and the powerful corporation of surveyors. The setting up of the structures for the management and delivery of land certificates also faced difficulties. By the end of 2011, only a few certificates had been issued.

² By titling, we refer here to the French word *immatriculation* where registration provides legal status.

³ A controversy exists on whether the certificate may or may not be mortgaged. Proponents of *immatriculation* argue that under Benin's ratification of the treaty for the harmonization of business law in Africa (OHADA), only titles can legally be mortgaged. Others argue that this interpretation is wrong. See an interesting note written by Philippe Lavigne-Delville on this topic.

Interestingly, although the key output of the program, the provision of the certificate is not the only important change brought to villages undergoing a PFR operation. The mapping itself seems to already generate effects as shown by an ongoing impact evaluation of the socioeconomic outcomes of PFRs carried out by the World Bank. Although just focusing on the early phases of the PFR for which data was collected so far, evidence of increased investment is found although tenure security may not immediately be increased or not increased for all users.

- *A program that is still to complete*

Because of controversies and resulting delay in implementation combined with unrealistic objectives (under a limited five year programmatic approach), the implementation of PFRs could not be finalized before the MCC Compact came to an end. This leads to a situation where, the structures in charge of certificate delivery and management do not appear to be fully in place and operational while future funding may not be guaranteed for a program which may not (yet) be self sustainable. At this stage, this may require other technical and financial partners to chip in, but whether this will happen and the probable delays before this happens may jeopardize the full completion of the program (as it may render the collected information on right holders obsolete before a certificate can be issued).

The program, although large, only covers a fraction of villages in Benin (300 out of more than 3000) and scaling-up mentioned in policy document (e.g. the *Plan de Relance du Secteur Agricole*) is still to happen.

Finally, it remains to be seen what the exact future of PFRs will be given the change in general land policy orientation that has progressively began to take shape after the 2007 land law, and which we will analyze in the next section.

Madagascar et Guichets fonciers communaux et certificats fonciers.

- *Historical framework of the Malagasy land reform*

Madagascar has suffered for decades from a land crisis that contributes to the current economic weakness and social tensions. A severely underfunded land administration, an outdated legal framework inherited from colonial times and a serious lack of confidence in the public institutions involved have resulted in a poor land management public service. Until a few years ago, Madagascar's 33 land registry offices were not able to issue more than 2,000 land titles per year in the whole country; there are around 5 million plots yet to be registered. Furthermore the land administration service faces a lot of constraints to maintain the land archives storage and maintenance system and to have records held closer to where the lands are actually occupied. This crisis situation has negative effects on the investment environment and social stability. It deprives local governments of land databases needed for land taxation, prevents any land use planning or urbanism activities, and makes natural resources management more complicated. Mindful of these facts, in 2005 the Government of Madagascar launched a land system reform based on a land administration modernization and decentralization process. A new legal framework was designed and enacted in consultation with all stakeholders of the land sector. The National Land Program was in charge of implementing this reform which was sponsored by 12 donors, in particular MCC. From 2007 a Land Observatory started to monitor performance and impacts of the land reform.

- *Major innovations*

Several important changes came with the 2005 land reform law. One was the deletion of the State property presumption. Previously, occupied but non-titled lands were considered to belong to the State. Under the new law these lands are considered as private properties. Local governments and their new Municipal Land Offices are now in charge of land rights formalization, not by delivering land titles but by issuing land certificates in a transparent local procedure after opposing claims are considered. The legal value of the land certificates is almost identical to that of land titles. Any transactions doable with land titles are allowed with land certificates: sale, lease, division, inheritance. The Municipal Land Office is a new Commune service, legally competent to manage any non-titled land property.

Madagascar has now two simultaneous land management systems. The public land administration is in charge of the State property and the titled private property management. The Communes are in charge of non-titled private property management.

- *First outcomes*

This decentralized land management system showed encouraging results. Since 2006, more than 450 out of 1,550 Communes have been equipped with a Municipal Land Office. They have registered 150,000 applications and have issued 75,000 land certificates⁴. The average cost of a land certificate is around \$14 and the average processing time is about 7 months. By contrast and despite a huge land administration modernization and computerization program driven from 2007 to 2009, land titles take 10 years to be issued⁵ and cost around \$500 each⁶.

Ce nouveau cadre juridique a une portée historique. Il permet à Madagascar de s'affranchir de la présomption de propriété, concept mis en place au tout début de l'époque colonial selon lequel tout terrain est supposé appartenir à l'Etat. Jusqu'en 2005, l'administration foncière était donc la seule autorité susceptible de valider des droits de propriété individuels pour des usagers ayant réalisé un effort de mise en valeur.

La décentralisation de la gestion foncière a donc permis de démultiplier le nombre d'acteurs en charge de l'immense chantier national d'enregistrement des droits sur la terre en conférant à 1,550 communes la possibilité de reconnaître les droits de propriété. Elle a permis une réduction drastique des délais et coûts d'obtention d'un document de pleine valeur juridique garantissant la propriété : le certificat foncier coûte 35 fois moins cher que le titre et s'obtient en 20 fois moins de temps.

This new legal framework has a historical significance. It allows Madagascar to overcome the presumption of State Property, a concept introduced at the early colonial period which means every parcel is supposed to belong to the State. Until 2005, land administration was therefore the only authority allowed to validate individual property rights for people who had made an effort to exploit the land (*effort de mise en valeur*).

Decentralization of land management has widely increased the number of stakeholders in charge of the huge national task of land rights registration by giving 1.550 Communes the competence to recognize

⁴ National Land Program, November 2011.

⁵ BEST / Land Ressources / IDEES Madagascar, *Rapport d'investigation sur le volet « coûts et délais de la titrisation »*. June 2011. 54 pages. A titling process duration average of 3,713 days was calculated based on 3,000 land titles issued from 2005 to 2010 sampled in six different districts.

⁶ ECR, 2006.

property rights. 450 Municipalities are now equipped with a land office. All have at least one agent land office, about 450 to 500 new people competent in land management, and about ten Local Recognition Committees of at least three people, or about 13,000 people involved from time to time in recognition of land rights and paid according to their participation.

This new procedure for local recognition of untitled private property rights, by Local Committees and without any official officer, allowed a drastic reduction in time and cost for a full legal documentation ensuring ownership: the land certificate costs 35 times less than the title and is issued by 20 times less.

- *Slowdown in decentralized land management*

Since 2009 the land reform expansion has slowed down. The municipal land offices creation pace has decreased since the beginning of the political crisis. Of the 454 land offices installed today in Madagascar, 300 were created in 2008 and 2009.

The pace of certification has also slowed, with 19,000 and 32,000 certificates annually issued in 2008 and 2009 against 12,000 and 10,500 certificates issued in 2010 and 2011⁷. Performance of municipal land office services has been affected as well. The number of land certificates issued by Communes fell from 81 in 2008 to 23 in 2011. The capacity of municipal land offices to carry out on the field the recognition of plots seems also to be weakened. Municipal land offices seem to focus their capacity to clear the pending applications. In 2008, only 30% of applications were turned into certificate, and this figure rose to 50% in 2011.

The decline in performance of municipal land offices is impacted by constraints of various kinds, some being specific to the process, some linked with external factors.

Analyzing land reform implementation constraints

Constraint inherent in the program process:

Benin: competing visions and fragile initial consensus on the objectives of the PFR

In Benin, the PFR program was implemented *before the framing of a land policy*, which exposed it to be challenged by the lack of initial consensus on the approach. As a matter of fact, the change in approach brought about by the PFR and the 2007 land law was not accepted by all due stakeholders due to diverging views among stakeholders regarding the long-term objectives of land policy (Lavigne Delville 2010).

Schematically, one vision aims to foster investment through improved tenure security, which may not require a title but may instead require an alternative to a title (land use certificate) that can take into account the complexity of rural land rights in a context where appropriation occurs through a complex set of customary rules.⁸ On the contrary, another vision considers that the long term objective of the land policy should be to develop land markets through the provision of land rights that can be mortgaged or

⁷ Land Observatory, March 2012.

⁸ This is through the expression of “*maitrisés foncières*” (Le Roy 2011) made of “*faisceaux de droits*” (Colin 2008) where the rights to operate are given by the ones who hold the rights to manage and the right to include/exclude (see Lavigne Delville, 2006, for a description and graph).

transferred to investors who can develop land so as to effectively increase investment and productivity. This is in line with the promotion of *immatriculation* and standard titling policies. To a certain extent, although this would deserve to be qualified, these oppositions schematically reflect the diverging views of the different actors in the land sector in Benin, with the initial implementers of the PFR and the Ministry of Agriculture more in line with the former, and those involved in the *immatriculation* process (Ministry of Urbanism, Ministry of Finance, surveyors) more in line with the latter.

Of course, there are nuances and a variety of arguments may be put forward in favor of one approach of the other. In rejection of the land certificate approach and in favor of titling, some have argued that only the title may provide tenure security⁹ and that certificates cannot be an alternative to titles as they may not be mortgaged¹⁰ and thus lay not facilitate access to credit, or because they are only a weak form of tenure (not guaranteed by the State) that makes them little desirable for investors. Some more radically believe that customary arrangements should not be accommodated but rather transitioned out of through the promotion of individual property rights.

In fact, PFRs could be implemented with a focus in either direction, depending on the nature of the recorded rights and the nature of the delivered document. In theory, a PFR procedure could lead to three types of rights (Lavigne Delville, 2010): (i) the recognition of the variety of local uses, (ii) the provision of some form of private property although not guaranteed by the State, or (iii) the provision of a fully-fledged title through the *immatriculation* of private property. There can be option to “upgrade” from one form to the next (although probably raising technical issues, for instance in terms of survey requirements). The delivered land use certificate form provides in its current an ownership right (or a right that seems to be interpreted as an ownership right).

Although the 2007 land law clearly made the choice of an alternative and decentralized approach to implement the PFR, it did not result in a strong support for the policy. The fact that the law was passed before a policy document was written implies that it was bound remain fragile and exposed to any future drafting of the land policy which would challenge the chosen orientations (and this is exactly what happened). Maybe the absence of a debate from the drafting of a policy prior to 2007 is what explained that the 2007 law passed in spite of the subsequent opposition that could have been observed. Another reason that may have played in favor of the adoption of the law could have been that the PFR was the only practical solution at hand to address the growing problem of land conflicts and lack of investment, and that the law was urgently needed in order to move forward with the implementation of PFRs (it would not have been consistent to engage into the “access to land” component of the recently signed Compact with the Millenium Challenge Coporation but not adopt a legal framework to allow the program to be implemented). However, the consensus that allowed the 2007 law to pass was fragile and due to the fact the rural land law did not frontally overlap with the prerogatives from the Ministry of Urbanism (Lavigne Delville, 2010) as it explicitly excluded present and future periurban land from the perimeter of PFRs. It was also fragile in the sense that having a law only for rural land (but not urban land) raised fairness issues (between rural and urban residents) and could be challenged afterwards with any change in the distribution of power of land stakeholders in Benin. The fact that periurban areas were excluded from

⁹ This is, however, in contradiction with the literature on the continuum of tenure rights.

¹⁰ This point is controversial.

the law and not addressed was also problematic given the lack of tenure security in periurban areas faced with rapid urban expansion.

Madagascar :

The land reform process in Madagascar meet with technical and financial constraints, and has to face capacities and competences issues.

Factors external to the program:

Benin: institutional overlaps and rival approaches

The balance of power between the different stakeholders was changed with the emergence of a new actor (MCA Benin) under massive financial aid (\$300 million to be disbursed under the MCC Compact over 5 years for a country which GDP was less than \$4.8 billion in 2006). With MCA Benin directly attached to the Presidency, this provided a new impetus to the land policy and potentially a change in the balance of power, where the orientation of the MCA would probably weigh very much. At the same time, the allocation of the responsibility of land reform to the Ministry of Urbanism (MUHRFLEC) provided support to a vision more favorable to the generalization of titling rather than the alternative approach of the land use certificate. This resulted in confusion and institutional ambiguity of who was in charge of the reform (with on one hand MAEP being the line ministry for PFRs while MUHRFLEC was responsible for both urban and rural land reforms, and MCA directly funded a large program of PFR not directly controlled by the Ministry of Agriculture).

At the same time, parallel processes were being pursued to complete the changes to the legal framework (with the desire not to have a separate urban law but integrate all legislation relative to land, whether urban or rural), reflecting the strategies of the different actors. Contrary to the passing of the 2007 land law, these processes gave rise to heated discussions (especially with the proponents of the initial PFR approach).

One such process revolved around the production of a White paper on land policy (*Livre blanc de politique foncière*) debated in 2009 under the aegis of the MCA. Commissioned to a consultant firm which had no previous experience on land in Benin, the White Paper promoted a very different view from that of the 2007 land law by proposing a diagnostic in favor of the generalization of title and the creation of a national cadastre and *immatriculation* agency. The proposal of an automatic conversion of certificate into title and the proposed weakening of commune prerogatives seemed contradictory with the initial philosophy of the PFR.

In parallel, the same year, the Ministry of Urbanism proposed Guidelines for the land reform (*Lettre de cadrage de la réforme foncière*) which they considered as the main land policy document but which integrated the options proposed in the White Paper.

The challenges posed the the PFR approach were to a certain extent reiterated in 2011 in the Land Policy Declaration (*Déclaration de politique foncière*) which only mentions the land use certificate in relation to its capacity to be transformed into land titles.¹¹

A draft Land Code (*Code Domanial et Foncier*) is currently examined by the national assembly and validates the creation of a national land agency (*Agence Nationale du Domaine et du Foncier*, ANDF) and the ensuing redefinition of the prerogatives of other actors in the land sector. It is not clear what will be the distribution of roles between the decentralized structures created by the 2007 land law and the “deconcentrated” chapters of the ANDF at the departmental level.¹²

All these document reflect a reorientation of PFRs towards the recording of private property (more than the recording of secondary rights as initially envisioned as well) and towards *immatriculation* (surveyors were also very active in imposing technical norms of surveying they benefitted from).

Madagascar

- *Madagascar : suspension of international funding in relation to the current political crisis*

First, momentum for reform was disrupted when the major donors (mainly MCC) decided to leave Madagascar following the political crisis. External funding to sponsor the reform sharply contracted from \$11 million in 2008 to just \$1 million in 2009 and 2010. Training and local empowerment activities stopped in more than 250 Communes.

Actually the future of the National Land Program (PNF) and of the Land Observatory is uncertain as these institutions are totally supported by donors.

The PNF, in charge of the project management (*maîtrise d'oeuvre*) of the land reform is now weakened and had to sell part of its staff, from 49 officers in 2011 to 15 officers in 2012¹³.

- *Weakened political will for decentralization of land management*

The *de facto* transitional government in power since March 2009 sought to stand out from the land policy introduced by the previous government. The will to reform land sector still displayed, but more in terms of land administration services strengthening, as evidenced by an recent operation for the issuing of 75,000 land titles well covered by local medias, the establishment of new regional land administrations or even construction of new administration buildings with domestic public resources.

Decentralization of land management doesn't seem to be considered as a priority by the Ministry in charge of the land sector. This trend already visible since the political change of March 2009 has

¹¹ Under “Orientation et axes stratégiques, orientation 1: la sécurisation de l'accès au foncier, Axe 1: élaboration d'une législation foncière et domaniale cohérente”, one can read: “La caducité et les difficultés d'application de certains textes régissant le foncier suggèrent l'élaboration d'un code foncier et domanial unique devant aborder tous les aspects du foncier (rural, périurbain, et urbain). Ce Code Foncier et Domanial consacrer le régime de l'immatriculation fondé sur la propriété foncière privée à partir des deux régimes fonciers existants, à savoir le régime du livre foncier, instrument exclusive de garantie des droits fonciers, et le Plan Foncier Rural, outil de clarification des droits fonciers en milieu rural”.

¹² Some CSOs are opposing the code, including a petition by the union “synergie paysanne” which say that it does not reflect the consensus discussed during consultations.

¹³ National Land Program, 2012.

increased since the last Government reshuffle split the previous ministry in charge of land by a Deputy Prime Ministry of Development and Land Use Planning and a Ministry of Decentralization.

- *Unspoken/tacit opposition to the land management decentralization and strategy to maintain the land titling system*

This lack of appetite to support the land management decentralization matches with the reluctance of the land administration officers. The more the Municipal Land Offices are numerous and efficient, the more they feel reticent to develop the on-going land decentralization process

Land rights registration is no longer a public service but a business and land administration officers are concerned about losing land management monopoly and their unofficial incomes coming from titling procedures given the increased number of Municipal Land Offices.

As they feel threatened by the land reform consequences and as they feel like competing with Communes, they logically develop strategies to defend their own interests, which includes a set of responses to react against this process: communication on land title as sole documentation to protect land rights, contesting the new procedures under the land reform even to the point of trying to undermine the legal value of land certificate or the competences of the Municipal Land Offices, reactivation of unfinished survey operations, preservation of obsolete land statutes, circular to make the establishment of Municipal Land Office more complicated,...

First, this position is due to a strong administrative culture related to their initial training. Land administration officers have been trained by other land administration officers at the ENAM¹⁴ to manage State Property and to implement procedures for land titling. Public surveyors have been trained at the Ecole Polytechnique to make land maps and to issue land titles within a traditional administrative framework. They had few training on Municipal Land Offices or on decentralization and they are still focused on the tools and procedures for which they were trained.

It appears clearly another factor, namely the gap between the low level of civil servant benefits and the power given by the control of land management. The land administration officers' salary grid applied to is that of the public sector supplemented by extra pay financed by a specific fund ("Fonds Commun") rose with public property sales. Thus the average land inspector monthly salary ranges from \$300 to \$700. According to a study published in 2006¹⁵, the average cost of a first titling registration was around \$500 and only 10% of costs for this procedure are formal costs. Hence we can assess each new land title establishment allows the distribution of approximately the equivalent of one month salary for the benefit of various stakeholders in charge of the titling issuance process. This economic rationale is jeopardized by the land management decentralization. The only land administration modernization, as new buildings or computerization, is not enough to maintain interest in the land administration reform because these investments do not compensate the rent level allowed by the current land management system.

¹⁴ Ecole Nationale d'Administration de Madagascar.

¹⁵ ECR, 2005. Les données de référence sur les coûts et les temps moyens requis pour l'exécution des procédures foncières. MCA, 19 p.

Given the risk of losing incomes and social standing, land administration officers has opposed a strategy to strengthen the traditional system of land titling which goes against the land reform first stage evaluation findings. According to this evaluation sponsored by various donors¹⁶, \$30,000,000 have been invested to modernize and computerize land administration and land titling system but it had no impact on service delivery. The land titling procedure average time even increased from 6 to 10 years and part of the hardware is no longer operational while new land management software are not yet finalized. The operation “75,000 Land Titles” has not achieved the expected results: it cannot issue the titles set during cadastral operations performed decades ago to the current owners. To the extent that on one hand, land certificates and the Municipal Land Offices have no longer strong political support and on the other hand, prospects for modernization and computerization seem doomed to failure, land reform process might be stifled. Political choices are to be expected and civil society should have a role to play.

Despite this context poorly suited to the land management decentralization, an obvious local dynamic seems to maintain the Municipal Land Offices. While major international funding were stopped from July 2009 to December 2011, 200 new land offices were established by Communes and the number of non-operational land offices remained estimated less than 20%. Over the same period and despite the political crisis, 43.450 land certificates were requested and 28.400 new certificates were issued.

Even an unfavorable institutional climate Municipal Land Offices are common part of one third of Malagasy Municipalities everyday life and this shows an evidence for securing land rights with the certificate. Decentralization of land management seems to have allowed the maintenance of a land rights management local service and may help to mitigate the impacts of political crisis and poor public service delivery.

What consequences ? What lessons?

Consequences: land administration and institutions at odds with new land policies?

In Benin as in Madagascar there are gaps between the traditional land administration services and the new land policy that could jeopardize the coming stages of the land reform.

Bénin :

In Benin, major stakeholders have defended opposing visions regarding policy objectives as well as technical choices, which seems to have delayed implementation. Investment in the municipal institutions for the management of PFR (delivery of certificates, update, registration of transfers) seems to have stumbled upon local level capacity issues (as evidenced by the limited number of certificates issued in comparison with objectives).

The main characteristics of the innovative approach that PFRs have introduced have been challenged: in the debate regarding the compulsory or on demand transformation of the certificate into a title

¹⁶ Andrianirina-Ratsialonana R., Legendre R., 2011. Evaluation de la réforme foncière à Madagascar, rapport final synthétique. Observatoire du Foncier / AFD, Fida, FAO, SCAC, Saha, CSN, AD2M, Cirad. 43 p. <http://www.observatoire-foncier.mg/downloads/Rapport-Evaluation-Reforme-Fonciere.pdf>

(*immatriculation*). It is not completely clear whether decentralization is following (or would be replaced by “deconcentrated” of the new national land agency ANDF).

Technical problems have also arisen. It seems that the PFRs implemented under the two programs have not satisfied the same norms and that only the bigger program suited norms for IGN certification (remark : this problem may have been solved now – to be checked). The question of the transition towards title not only raises conceptual issues (Why ? What increment in tenure security and mortgageability does this bring ? Is it worth ? Isn’t this in opposition to the initial PFR philosophy?) but also technical issues (What are the technical requirements for a land use certifiical certificate and for a title? Does it make sens to align the technical requirements of PFR on those of “*immatricutution*”? What will be the cost ?)

Other problems revolve around the non-recording of secondary rights. It seems that this was not an ouput from the PFR process. Is it because the population is reluctant to do so or because program implementation did not sufficiently focus on this? Does it have an implication in terms of balance of power between users in the village?

The end of funding is also a major challenge.

A Madagascar :

There is now a discrepancy between on the one hand, a land administration trained and arranged to process a Torrens land system type based on the presumption of State ownership and on land titling and on the other hand, a new land policy based on a presumption of private property and turned toward a decentralized land management system.

Is land administration, designed from the colonial era to manage the State Property, still organized and equipped to implement the new land policy essentially based on municipal land management and land certificate?

It appears this is not the case. This gap between policy and administration questions in terms of competences, capabilities and funding:

- The issue of legal competences between municipal land offices and land administration services about land under untitled private property (Act Nr 2006-31) remains to be clarified. The registration of rights on these lands is theoretically the jurisdiction of the municipal land office, but a direct land titling process seems to be still possible. Moreover, lack of information exchange between municipal land offices and land administration services due to incomplete and unreliable information on the location of titled property, generates confusion between land titling and land certification procedures. There is a risk to issue certificates on titled parcels and to issue titles on certificated parcels. These situations are conducive to conflicts of competences between the various institutions in charge of land rights registration.
- Lack of local capacity is also a major issue. Municipal land offices officers were trained, sometimes briefly, by temporary programs supported by the international donor community. Their skills rarely reach the required level and their replacement is problematic due to the lack of staff trained in decentralized land management. Land administration officers also have few capacities in decentralized land management and are not motivated to strengthen a system which could reduce

their incomes. The few PNF field officers can not now operate with 454 Communes equipped with their municipal land office. Thus, it needs to be realized that the main part of municipal land offices have no longer any support, advice and supervision to help them achieve innovative activities in a sensitive topic.

These two land reform processes show i/a growing mismatch between new land policy directions that deviate from the Torrens model and land administration initially designed to operate a Torrens land management system, and ii/ another mismatch between the time required to implement a land reform and the life expectancy of a government or a policy orientation or a politician that believes in the benefit or the direction of a land reform. Therefore, as donors, we have to take advantage of windows of opportunity necessarily limited in time to support long-term programs difficult to reverse.

Lessons learned: land sector needs a deep restructuring

Land reforms in Madagascar and in Benin are now at a crossroads: they either may choke if a new institutional deal is not implemented, or they redefine the institutional land sector framework to match land policy and land administration.

In both countries, these reforms are based on local capacities to formalize land rights. They may deprive traditional land administration stakeholders of their usual rent. New institutional arrangements are needed to provide incentives for all land reform stakeholders and to empower land management capacities of local governments.

In Benin, maintaining implicit policy orientation associated with PFR while the legal framework is not completely set and policy documents were being drafted by other stakeholders than those who initiated the program became difficult. What we learn is that starting to implement a project before the legal framework and the land policy documents are in place is certainly risky as the projects get delayed or runs the risk of being transformed or reoriented towards other policy objectives. In particular remains to be seen if the land code will be voted. It proposes the creation of a *Land Ownership Certificate* and the articulation with the Land Use Certificate (article 139) does not seem very clear to us. How does it differ from a certificate or a title? Is this a shift for a presumption of right towards a real (as article 146 says it confers full ownership)? What will be the exact role of the national land agency (ANDF)? Will it complement or diminishing the role of the local land administration created in the 2007 land law. Is the land code clarifying or exacerbating overlaps in land management?

In Madagascar a land sector institutional audit is planned to build consensus on a shared vision about the future nature and functions of institutions involved in the land policy implementation. In order to solve issues regarding Communes' land management capacity and competence, it seems essential to think about the establishment of new institutions.

A new administration in charge of advising municipalities and their land office is essential to the implementation of a policy for supporting Communes' land activities. The competence of this administration should be extended to other dimensions of Communes' life by providing technical

advice in order to strengthen their new skills (land taxation, natural resources management). The establishment of a national training institution for new jobs in decentralized land management is also essential so that municipalities can hire officers with a standard level of capacities. A new trade -the Municipal Land Officer- with a specific status and qualifications needs to be designed yet. Another avenue to consider is that of a para-public agency in charge of State property management, especially for large scale land transactions. This agency could be compensated in part on earnings made by State property leases.

These changes must be discussed within the framework of a national debate including land administration heads and representatives of local elected officials and civil society.

Reference list

Colin, Jean-Philippe (2008) “Disentangling Intre-Kinship Property Rights in Land: A Contribution of Ethnography to Land Economics in Africa”, *Journal of Institutional Economics*, 4, 2, 231-54.

Le Roy, Etienne (2011) *La Terre de l'Autre. Une Anthropologie des Régimes d'Appropriation Foncière*. Collection *Droit et Société*, Volume 54, 441 pages.

Lavigne Delville, Philippe (2006) “Registering and Administering Customary Land Rights”, Communication to the World Bank Conference on “Land Policies & Legal Empowerment of the Poor”, Washington DC, November 2-3.

Lavigne Delville, Philippe (2010) « La Réforme Foncière Rural au Bénin. Emergence et Mise en Question d'une Politique Instituante dans un Pays sous Régime d'Aide », *Revue Française de Science Politique*, 60, 3, 467-91.